

4 August 1966

TO: The Honourable Mr. Justice McGillivray

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Osgoode Hall

Toronto, Ontario

*Toronto Transit Commission
withdrawn as a party to this brief
9/27*

Dear Sir

The submissions which are hereinafter set forth are made on behalf of Canadian National Railway Company, Canadian Pacific Railway Company, and those companies set out in Schedule A hereto attached, all of which companies constitute a substantial segment of those Employers coming within Schedule 2 of the Workmen's Compensation Act, and as such being individually liable to pay compensation and medical aid payments.

It may be of interest to record that the payments made by the Canadian National Railway Company and Canadian Pacific Railway Company in 1965 were as follows:

	<u>Total Disability & Medical Aid</u>	<u>Pensions PPD & Death</u>	<u>Administration Charges</u>
Canadian National Railway Company	\$742,912.30	\$586,181.59	\$100,124.05
Canadian Pacific Railway Company	<u>475,065.36</u>	<u>343,374.66</u>	<u>55,116.13</u>
	<u>\$1,217,977.66</u>	<u>\$929,556.25</u>	<u>\$155,240.18</u>

The amounts paid by the Companies listed in Schedule A appear as part of that Schedule. It will be observed that the above payments and those appearing in Schedule A do not include the internal administration expenses associated with the discharge of the Employers' functions under the Act, nor those arising from the rehabilitation of injured workmen. Not only because of the substantial expenditure of time and money, but for the broader reason that they are the employers of a large and divergent body of workmen, the companies are vitally interested in the subject matter of this Inquiry.

Although we will submit for your consideration certain proposed changes in the Act which are largely of a procedural nature, it is our position that the Act in its present form provides an equitable basis of workmen's compensation and medical aid and that the present standards and conditions relating to the benefits and obligations should not be altered. As it is intended that this brief contain but an outline of our position, it would seem inappropriate that we should set out in detail our views in relation to each benefit, condition or obligation and state why we think each should not be altered. We take the liberty of assuming that if and when representations are made advocating any such change or changes that we will be permitted to make such written or oral submissions to you as may be appropriate and of assistance to you.

If it be assumed that representations will be made to you that alterations should be made to the Act which will have the objective, among others, of changing the available benefits and/or the conditions and obligations as they now exist it would seem to be relevant to re-examine the nature and origin of the Act as it is against this general background that any specific proposals must be evaluated as to their fitness for inclusion in workmen's compensation legislation.

Purpose and Objective of Workmen's Compensation Act

As has been frequently stated the adoption by legislation of a system of workmen's compensation was a substitute for the rights, obligations, and remedies as between employer and workman as such existed at common law in the event that the workman sustained injury while acting in the course of his employment. In general it may be said that at common law the disabled employee had a claim enforceable by legal action against his employer for whatever might be adjudged to be

full damages commencing with the date of the injury; but in order to succeed, the workman had to prove that his injury and consequential damages were caused by the fault of his employer. Even if he was able to prove such fault and even if such fault contributed to the injury he could be wholly defeated if he himself had contributed to his own injury. He could likewise be defeated if it was found that he had assumed the risk entailed in his work or if the fault was that of a fellow employee of the same employer who was found to be in "common employment" with him. It was this situation which in 1952 caused Chief Justice Sloan of British Columbia to comment in his Report upon the Act of that Province that it was only in 20 to 30 per cent of injury cases brought before the Act that damages were recovered. Mr. Justice Tysoe at page 18 of his Report of 1965 echoed this observation. It may be that in those actions in which the workman was successful the fact that the sum recoverable was limited only by the amount of damages which could be established by relevant evidence and by the financial capacity of the employer, the employer would encounter a very substantial judgment; but where the workman failed in his action, which he did in most cases, the results were often disastrous to him.

Under the Act the need of establishing fault on the part of the employer was removed and it became a matter of liability without fault, except in a relatively minor group of cases where the cause of the injury was due to serious and willful misconduct on the part of the injured workman. The giving up of the defences which had been open to him was at least one of the major contributions of the employer to the new system. On the other hand the workman gave up his right to claim full damages from the date of the injury in return for certainty of recovery of compensation and of medical aid and this was

one of the major contributions of the workman to the system. It is beyond the scope of these observations to detail the various benefits acquired by both workman and employer under the Act or to set out the new balancing of rights and obligations which took place. Mr. Justice Roach made some extended reference to these points at pages 11, 28, 29, and 30 of his Report of 31 May 1950.

The scope of this submission is limited to underlining that there are certain fundamental concepts which have been present in the Act, certain of which are:

- (1) The legislation deals with "accidents" suffered by an ascertainable group---workmen of certain industries.
- (2) Liability to workmen unrelated to fault (excepting a restricted number of accidents involving gross fault).
- (3) The workman and employer each contribute so that in effect the loss is shared by them.

It is our belief that the above elements are to be found in any scheme of Workmen's Compensation. In a sense, such legislation can be said to be social legislation in that employers and workmen recognized the iniquities and uncertainties present where the issue was basically that of liability for fault and each joined in a new contributory system that benefited both. But such a system is not to be confused with: (1) a system whereby payments are made to a defined class of individuals (whether payments are contributory or not) and which payments constitute an initial charge upon the body politic, (2) social welfare schemes (non contributory)

where the basic principle is need (with or without a means test) and the cost is again born by the body politic.

The distinction between the subject of the Workmen's Compensation Act and 'social welfare' can best be defined by reference to what has been said by other Commissioners of Inquiry. In 1942 Chief Justice Sloan in his Report upon the Act of British Columbia stated

"Workmen's compensation is not---and I stress the negative aspect---is not a system of unemployment insurance, it is not health insurance, it is not an old age scheme. It is simply a form of insurance against fortuitous injury."

At page 12 of his Report of 31 May 1950 as to the Act of Ontario, Mr. Justice Roach commented as follows:

"This Act should be considered for what it is and was originally intended to be, namely, a scheme by which compensation is provided in respect of injuries to workers in industry. It is not a system for dispensing charity. It is not unemployment insurance. It is not social legislation for the purpose of elevating the standard of one group in society at the expense of another.

"I will have occasion to point out later that certain amendments which have been introduced into the Act since it was originally passed are really in the nature of social legislation and a departure from the original scheme and purpose of the Act. The effect of those amendments has been to impose upon industry burdens which should be borne by society generally.

"If the true purposes and objectives of the Act are adhered to, justice will be done as between industry and labour. If, on the other hand, those purposes are lost sight of, or this Act from time to time be regarded as a convenient place into which to put legislation which in substance is social and not compensatory, it may become very much distorted. In the result, labour will continue to be relieved from unjust burdens from which it suffered too long under the common law but an injustice will be done to industry by placing on its shoulders burdens which should be borne by society generally."

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Lastly, reference may be made to the view as expressed by Mr. Justice Tysoe at page 19 of his Report of 26 November 1965 as to the then Act of British Columbia:

"These considerations persuade me that workmen's compensation should not be converted into social welfare, and that it is proper to distinguish between what should be borne by industry alone and what should be borne by society as a whole. Moreover, in my view, workmen's compensation should not be distorted into health and accident insurance. It would be quite wrong in principle and unfair to other citizens of British Columbia for workmen who fall within a particular category to be in such a favoured position as they would be were workmen's compensation to become a scheme for the provision of general health and accident benefits instead of one for relief by way of medical aid, compensation, and rehabilitation in cases of work-connected injuries or diseases."

It is our submission that the principles of the Act are still as valid as when the Act was first brought into being and that any suggested alterations must be looked at calmly and judiciously in order that the Act be kept within its proper bounds as Workmen's Compensation legislation and that the balance between contributions and benefits be kept in balance.

It may be reasonably observed that the contribution of the workman to the scheme, which involves no actual payment by him, has certainly not increased over the years. On the other hand the employer has been called upon to make all direct payments required of the scheme and which payments of compensation, medical aid and administration costs of the Board have steadily increased over the years. This ignores the substantial costs associated with internal expenses associated with administration and the costs of rehabilitation programmes both of which have been incurred by the employer.

If it is to be insisted that benefits which are properly classified as social welfare are to be forced into the Act it would

be but just and equitable that all interested parties, the employer, the workman, and the government, contribute to the scheme in proportion to the benefits received by each class. It is to be noted that the consolidated revenue fund of the Province contributes nothing to the present cost of compensation, medical aid or the administration costs of the Board.

Specific Recommendations

1. Medical Reports

Knowledge of the contents of medical reports in the possession of the Board is essential to a prompt and sound assessment of injury, the matter of compensation, the question of medical aid and the most beneficial method of rehabilitation. Employees coming within Schedule 2 have perhaps more direct connection with this need than those within Schedule 1, but it would seem to be of universal application that the medical advisors of interested parties should have the benefit of this information. It is recommended that the Act be amended by adding a section thereto similar to that which appears as Section 50 of the Quebec Act which reads as follows:

Reports to be privileged.

50. The reports to the Commission made by a physician, practitioner or expert, shall be confidential and privileged and, as such, cannot give rise to a claim for damages.

Communication

The Commission shall communicate to the physician attending the injured person or to the employer's physician, any medical report relating to the accident, if the injured person or the employer, as the case may be, so requires.
21 Geo. V, c. 100, s. 50; 11-12 Eliz. II, c. 41, s. 9.

2. THE Right to Appeal

We submit that the Act should provide a right of appeal to the Court of Appeal from a decision of the Board upon a question of law or of jurisdiction, and that the Board itself should

be enabled to state a case to the Court of Appeal on any question which in its opinion constitutes a question of law or jurisdiction. In addition, provision should be made for the hearing on any such appeal or case stated of any association representing a class interested in the outcome of such proceeding. A draft clause reflecting these proposals is attached as Schedule B hereto.

3. Election - Time Limitation

By Section 7(2) and Section 9(4) of the Act the time limit within which an election to claim compensation is to be made is three months. However, it is to be noted that this time limit may be extended for an indefinite period by the Board. It may be the intent expressed in the Section that the power to extend shall apply only to fatal cases. As the exercise by the Board or by the Employer, as the case may be, of the subrogation rights given by Section 9(3) commences with the election, some problems may be created if the election is not made within the time limited for action against a third party who allegedly caused or contributed to the injury or death of the workman.

The initial period of three months creates difficulty in this respect if the limitation period for any action against the third party is three months or less. A limitation of three months exists in relation to actions arising out of non repair of highways.

With reference to the matter of extension of the time set forth in Section 7(2) it is assumed that the Board would not prejudice its rights to take action by an extension beyond the applicable limitation period in those cases where the action is to be brought by the Board. Nor do we believe that the Board would intentionally prejudice the employer by an extension in

those cases where the action is to be brought by the Employer; but we are of the opinion that the Act should contain express protection of the Employer in this regard.

There would seem to be several ways in which the above objectives could be accomplished but it is our respectful submission that the above difficulties created by the present subsection (2) of Section 7 can be remedied by altering this subsection and adding an additional subsection as indicated in Schedule C hereto attached.

There would seem to be some ambiguity in the wording of Section 7(2) creating some doubt whether the right to extend the time for election applies to non-fatal cases. Fairness to the workman would seem to justify any necessary clarification to make such an extension possible.

The proposed alterations would not appear to work any hardship on the workman and would remove the risk of a procedural bar creating an immunity for a third party who in fact caused or contributed to the injury of the workman.

4. Reasons for Decisions

The Administrative Bodies under the Act render decisions affecting the rights of interested parties and in many instances do so without supplying reasons for their decisions.

It is our respectful view that under these circumstances the number of appeals will increase on the one hand due to the uncertainty as to the basis of the decision, and on the other hand certain cases will not be appealed where perhaps if reasons were given it would be clear that an appeal was necessary to protect the rights under the Act of the aggrieved party.

In the former case, appeals would occur as a matter of course and greatly increase administrative costs; in the latter case, though appeals would diminish in number, the purpose of the Act would not be fulfilled.

It is respectfully recommended that in decisions given by the Administrative Bodies wherein the rights of the interested parties are affected, that reasons in support of the decisions be set out and conveyed to the interested parties.

The parties to this Brief value this opportunity to present their views to the Inquiry and express the hope that the recommendations and suggestions will be of value and assistance.

Yours very truly

W. R. Burnett.

W. R. Burnett, Q.C.
On Behalf of the Parties
Herein Named

Schedule A

Amounts paid for workmen's compensation in 1965 by Schedule 2 employers who are parties to this submission.

<u>Name of Company</u>	<u>Total Disability & Medical aid</u>	<u>Pensions PPD & Death</u>	<u>Administration Charges</u>
Toronto, Hamilton & Buffalo Railway Company	\$ 10,434.95	\$ 11,741.00	\$ 1,884.96
Norfolk & Western Railway Company	13,238.69	5,588.50	1,627.01
New York Central System	16,044.48	40,066.45	4,769.43
Chesapeake & Ohio Railway Company	12,612.62	12,274.28	2,115.39
Toronto Transit Commission	138,109.75	31,684.81	14,432.54
<u>Total</u>	<u>\$190,440.49</u>	<u>\$101,355.04</u>	<u>\$24,829.33</u>

SCHEDULE B

- (1) An appeal lies from the Board to the Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from a judge of that Court upon application made within one month after the making of the order or decision sought to be appealed from or within such further time as the judge under special circumstances allows, and upon notice to the parties and the Board.
- (2) The Board may of its own motion state a case in writing for the opinion of the Court of Appeal upon any question which, in the opinion of the Board, is a question as to its jurisdiction or a question of law.
- (3) On the hearing of the appeal, or stated case, any association representing a class interested in the result of the proceeding is entitled to appear and be heard after due notice to all parties thereto as if it were a party appellant.
- (4) The provisions of The Judicature Act and the Rules of Practice of the Supreme Court of Ontario, so far as they are applicable and not inconsistent herewith, shall apply to every proceeding before the Court of Appeal or a judge thereof under the provisions of this section.

SCHEDULE C

Elections and Limitations

- (2) Notice of the election, where the compensation under this Part is payable by the employer individually, shall be given to the employer and, where the compensation is payable out of the accident fund, to the Board, and shall be given in both cases within two months after the happening of the accident or, in case it results in death, within two months after the death or within such longer period as the Board may allow.
- (3) The Board shall not grant an extension of time under subsection two if such extension would prejudice the Board or Employer in regard to any right of action under Section 9, subsection (3) being barred by reason of the expiry of a limitation period for the bringing of an action against a third party who caused, or contributed to, the injuries of the employee.

